No. 96-910

(10)

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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CITY OF CHICAGO, *et al.*,
*Petitioners*,
v.
INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR PETITIONERS

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Respondents' brief notably fails to dispute the two most critical elements of the jurisdictional inquiry in this case: (1) that ICS elected to allege in its state-court complaints that the Landmarks Commission's decisions violated its federal constitutional rights, and (2) that longstanding principles of federal jurisdiction (now codified in the supplemental jurisdiction statute) provide that a federal court with such a federal question before it may also hear state-law claims even when they would not otherwise fall within federal jurisdiction. These basic principles are dispositive here, for they establish that ICS has filed complaints that contain federal claims falling within the district court's original jurisdiction and state-law claims falling within its supplemental jurisdiction.

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* Peter C.B. Bynoe, identified as a petitioner in our opening brief, no longer sits as a member of the Commission on Chicago Historical and Architectural Landmarks.

## I. A COMPLAINT CONTAINING FEDERAL LAW CLAIMS AND STATE-LAW, ON-THE-RECORD REVIEW CLAIMS IS A CIVIL ACTION WITHIN FEDERAL JURISDICTION.

Respondents do not begin their analysis where one would expect—with the text of the jurisdictional statutes at issue. Rather, respondents contend that "in deciding whether a complaint for administrative review is removable, a court must focus on the nature of the state judicial action and the standard of review to be applied by state courts." Resp. Br. 5. This assertion is not based on any language actually found in a jurisdictional statute but on what respondents say is the "great weight of authority." *Ibid.* That weight of authority turns out to be a single sentence taken out of context from *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), a similar sentence from *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), and decisions from the First and Fourth Circuits. The text of the pertinent jurisdictional statutes, however, is to the contrary.

As we explain in our opening brief, federal jurisdiction over state-law claims that are joined with federal questions is governed by the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). That provision does not require that a state-law claim be an "original" action or one involving "de novo" review; it instead grants "supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Respondents do not doubt that their state administrative review claims constituted "claims" sufficiently related to their federal constitutional claims to be part of the same case or controversy. Yet that is all that is necessary for these claims to fall within the federal courts' congressionally granted supplemental jurisdiction.

As for the "weight of authority" itself, on the first factor respondents propose—the nature of the state action—the precedents help respondents not at all. We



readily agree that proceedings before an administrative agency are not removable (see Pet. Br. 31, 34-35), but *Stude* itself, on which respondents otherwise heavily rely, explains that when a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court." 346 U.S. at 578-79. And in *Horton*, the Court squarely held that such an action may be heard by a federal district court. See 367 U.S. at 354-55. Thus, this Court has already determined that actions seeking judicial review of an administrative decision are within the jurisdictional competence of the district courts; indeed, respondents' brief does not appear to argue to the contrary.

As for respondents' second factor—the "scope of review" to be applied—*Stude* and *Horton* establish, as respondents concede, that "administrative review cases that seek trials *de novo* in the state . . . court are removable." Resp. Br. 4. Nothing in the Court's decisions in those cases suggests, however, that such de novo review is required for removal. The Court in *Stude* did not even mention the scope of review of the administrative valuation proceeding in assessing jurisdiction, and the Court in *Horton* did so only in passing. The language in *Stude* that respondents latch onto—that a district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding" (346 U.S. at 581)—is not about the scope of review to be exercised by a federal court, since the state-law action at issue there was for de novo review of an administrative body's decision, as respondents acknowledge. See Resp. Br. 6. Thus it was not deferential or on-the-record review that created the jurisdictional problem in *Stude*. Rather, as we explain in our opening brief, there was no right of removal in *Stude* because the railroad had attempted to contest the administrative calculation of a condemnation award while leaving the other aspects of the eminent domain proceeding to be decided elsewhere—a choice that produced what was an

"appellate" proceeding not within the district court's jurisdiction because the railroad was attempting to obtain review of only a single administrative finding and not the judgment. See Pet. Br. 31-32; see also 346 U.S. at 581-82. In *Horton*, by contrast, the lawsuit did not have an interlocutory character because the insurance company had filed suit seeking to set aside the administrative decision, not merely one of the findings, and " 'a suit to set aside an award of the board is in fact a suit, not an appeal.' " 367 U.S. at 354 (quoting *Booth v. Texas Employers' Insurance Association*, 132 Tex. 237, 246, 123 S.W.2d 322, 328 (1938)). That was why the Court rejected Horton's reliance on *Stude*, explaining that the insurance company's suit "is not an appellate proceeding." 367 U.S. at 355.

It is true that the First and Fourth Circuits have embraced respondents' reading of *Stude* in the two 1995 decisions on which respondents rely, although they did so in the context of diversity jurisdiction without considering whether such a limitation on jurisdiction can be reconciled with the supplemental jurisdiction statute, and in the face of a contrary Eighth Circuit decision that had been treated as settled law for nearly four decades.[1] And that is the

[1] The decisions that support respondents' reading of *Stude* are *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995). As we explain in our opening brief, these decisions are in conflict with *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957). See Pet. Br. 38-39. The other cases respondents cite, however, involve quite different jurisdictional problems than the one respondents claim exists here. *Labiche v. Louisiana Patients' Compensation Fund Oversight Board*, 69 F.3d 21 (5th Cir. 1995) (per curiam), did not involve removal; there, the plaintiff filed his claim in federal court attacking an agency's decision but did not raise any claim arising under federal law and for that reason there was no federal jurisdiction. See *id.* at 22. In *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), the plaintiff raised federal claims seeking review of a state agency decision (see *id.* at 9-11), but the court found that the federal civil rights claims were not "an appropriate vehicle" to decide whether a state agency's decision was "arbitrary and capricious." *Id.* at 11. In *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979), the court considered and rejected plaintiff's constitutional challenges to the administrative proceedings that caused her demotion, and then declined to hear her remaining state-law claim as pendent to her federal claim. See *id.* at 1193-94. *Shell Oil Co. v. Train*, 585 F.2d 408 (9th Cir. 1978), held that state administrative decisions cannot be reviewed under the Administrative Procedure Act. See *id.* at 414. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), held that a labor board adjudicating questions between parties of unfair labor practices is a "court" from which proceedings are removable. See *id.* at 41, 43-45. In *Trapp v. Goetz*, 373 F.2d 380 (10th Cir. 1968), the court held that the district court lacked jurisdiction over a federal action for pension benefits because the city pension board was still deciding the claim. See *id.* at 382-83. In his dissent in *Fairfax County*, Judge Widener distinguished most of these cases on these very grounds. See 64 F.3d at 162 n.4.



extent of the "great weight of authority" supporting respondents' reading of *Stude*.

In the end, debate about isolated sentences in *Stude* and *Horton* is not necessary here, since this Court has spoken directly to the question whether an action involving something other than de novo review is a "civil action" within "original jurisdiction." As we explain in our opening brief (see Pet. Br. 11, 29-30, 39, 48), in *Califano v. Sanders*, 430 U.S. 99 (1977), this Court held that district courts proceeding under their federal-question jurisdiction may conduct on-the-record review of administrative decisions in actions under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 ("APA"). See 430 U.S. at 107. Thus respondents' position that an action involving deferential or on-the-record review is not a "civil action" within a district court's "original jurisdiction" cannot be squared with the established fact that an action seeking judicial review of a federal agency's decision under the APA is a "civil action" within the "original jurisdiction" of the federal district courts within the meaning of the federal-question statute, 28 U.S.C. § 1331. APA actions, of course, involve deferential review based on the record before the agency and for that reason they constitute precisely the type of "appellate proceedings" that respondents

claim district courts may not hear.[2] Our point, of course, is not that the APA is applicable to state administrative agencies, a position respondents seem to attribute to us. See Resp. Br. 12. Our point is rather that this Court has already determined that Congress included within the grant of "original jurisdiction" federal-question cases requiring federal courts to conduct on-the-record, deferential review. And, of course, the terms of the removal statute, 28 U.S.C. § 1441, track the terms of the federal-question statute.

Respondents cannot explain why, if the district court's jurisdiction extends to federal administrative claims that are reviewed deferentially, it does not extend to state administrative claims that are reviewed deferentially. Certainly there is nothing in the language of Section 1331 to suggest that a "civil action" within "original jurisdiction" means one thing when the decision of a federal agency is to be reviewed and something else when the decision of a state agency is attacked. Nor do the terms of the statute suggest that the phrase "civil action" within "original jurisdiction" could mean one thing in Section 1331 and something else in Section 1441.

Bereft of any textual support in the statute, respondents attempt to distinguish state and federal administrative review based on "notions of comity and federalism." Resp. Br. 12. But as we explain in our opening brief, whatever federalism concerns exist when federal courts are called upon to decide questions of state law have never been thought to give rise to a limitation on the explicit statutory authority of the federal courts to hear such claims. See Pet. Br. 43-46. Moreover, respondents do not explain why federal judicial review of state administrative decisions implicates such concerns. As we also set forth

[2] See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("focal point for judicial review should be the administrative record already in existence"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-16, 419 (1971) (administrative review is based on record compiled by agency).



in our opening brief, if a de novo proceeding attacking an agency's decision does not offend federalism—and the Court in *Horton* plainly did not think that it did—on-the-record review certainly does not intrude. It is, if anything, more protective of state and local interests because it provides deference to state decisionmaking that de novo review does not. See Pet. Br. 47.[3]

We explain in our opening brief that the concept of a "civil action" within "original jurisdiction" has historically been understood to be comprehensive, reaching every type of action of a civil character that is of a judicial nature. See Pet. Br. 33-38. Under *Califano v. Sanders*, that includes a case seeking on-the-record review of an administrative decision. Respondents thus are reduced to relying on a statement from a reversed district court case, which suggests that such sociological, legal, and political developments as "the rise of populism, the demise of economic due process, and ultimately the advent of the New Deal" mean that the historical and longstanding definition of civil action might no longer be satisfactory. See Resp. Br. 7. But the jurisdictional inquiry cannot be divorced from historical understandings as ICS urges. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), for example, the Court based its holding on its "unwilling[ness] to cast aside an understood rule that has been recognized for nearly a century and a half" (*id.* at 694-95) and relied on precisely the same kind of "19th-Century Court precedent" (Resp.

[3] Respondents warn that our position will mean that "every landmarks commission decision and zoning board decision soon will find its way into federal court." Resp. Br. 13 n.5. But supplemental jurisdiction over state-law claims exists only when a plaintiff has also included in a complaint already pending in the district court a substantial federal claim falling within either federal-question or diversity jurisdiction. The alternative, in any event, is more unattractive. Under respondents' view and that of the court below, a plaintiff that wishes a federal forum for its federal claims must file two actions, since state-law administrative review claims can be heard only in state court.

Br. 7) that respondents here assail.[4] That is scarcely surprising; one would think, as the Court apparently did in *Ankenbrandt*, that the doctrine of *stare decisis* would be especially powerful in the area of longstanding statutory grants of jurisdiction where certainty and predictability are especially important.

More important, respondents do not defend the court of appeals' holding that because the district court lacked jurisdiction to hear administrative law claims under state law, its judgment—including its rejection of respondents' federal constitutional claims involving de novo review—should have been vacated in its totality and all of respondents' claims remanded to state court. As we explain in our opening brief, even when a federal court is jurisdictionally barred from hearing some claims before it, that does not affect its jurisdiction over others. See Pet. Br. 40-42. The supplemental jurisdiction statute, for example, only authorizes federal courts to decline jurisdiction over "all matters in which State law predominates . . . ." 28 U.S.C. § 1367(c). There is simply no reason—and respondents advance none—why the presence of some jurisdictionally defective claims in a complaint could somehow infect the others with a type of jurisdictional contagion that requires that the entire case be sent to state court.[5]

[4] Respondents dismiss a wealth of historical precedent with the comment that "these early decisions are of dubious value . . . because they do not address the standard of review to be applied in the state appeal." Resp. Br. 8. That is precisely our point—the scope of review to be applied has never been thought significant in ascertaining jurisdiction. Respondents thus advocate ignoring an entire body of jurisdictional law because it does not meet the test that they now believe—despite an absence of textual or historical support—is of primary importance.

[5] The only precedent cited by respondents or the court of appeals in support of the approach taken below is *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 513 U.S. 876 (1994). *Frances J.* was the subject of considerable criticism in both our opening brief and the two amicus curiae briefs supporting petitioners. In response respondents write simply that they have "no need to defend the holding of *Frances J.*" Resp. Br. 27. On that basis, respondents should offer some other precedent to support the judgment below, but they do not.



## II. ICS'S FEDERAL CONSTITUTIONAL CLAIMS ARISE UNDER FEDERAL LAW.

Since at least *Gully v. First National Bank*, 299 U.S. 109 (1936), it has been settled that a claim "arises under" federal law for purposes of federal-question jurisdiction when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Id.* at 112. Even respondents accept this settled formulation. See Resp. Br. 17. ICS's state-court complaints plainly satisfy this test; as we explain in our opening brief, the complaints allege that ICS had a constitutional entitlement to demolish the buildings on its landmarked property (see Pet. Br. 17-20), and in their brief respondents do not quarrel with that characterization.

Instead, respondents advance an argument that the court of appeals did not embrace—that their state-court complaints did not fall within federal-question jurisdiction because they purported to rely on the right of judicial review contained in the Illinois Administrative Review Law, rather than a federally created right to attack governmental action such as the cause of action for deprivation of federal rights set out in 42 U.S.C. § 1983. See Resp. Br. 21-24.[6] Apparently seeking to have the Court repudiate the *Gully* test, respondents urge reliance on Justice Holmes's statement in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), that "[a] suit arises under the law that creates the cause of action." *Id.* at 260. See Resp. Br. 17. This rule of thumb, however, "has been rejected as an exclusionary principle." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S.

[6] Although respondents assert that the court of appeals found that there were no identifiable federal claims in the state-court complaints (Resp. Br. 2-3, 20), in fact the court of appeals acknowledged that the "complaints contain several challenges to the Chicago Landmark Ordinance arising under the federal constitution . . . ." Pet. App. 22a n.14. See also *id.* at 20a.

1, 9 (1983). Moreover, respondents never explain why their complaints fail to satisfy the rule that they urge. Respondents of course do not suggest that the Illinois Administrative Review Law created the right to relief from an administrative decision that unconstitutionally denies a landowner the right to demolish a building it owns; the constitutional claims in ICS's state-court complaints rest on rights and immunities created by federal and not state law. That the complaints also assert rights and seek remedies created by state law should not obscure the fact that the federal claims arise under federal law.

Respondents also rely on *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), in which the Court held that a tort action did not fall within federal-question jurisdiction even though the plaintiffs alleged that Merrell Dow had injured them by mislabelling a drug in violation of a federal statute. See *id.* at 805, 817. In that case, the plaintiffs had no rights created under federal law; the parties agreed that the federal statute at issue contained no private right of action. See *id.* at 810-11. As a result, the Court concluded that "it would flout congressional intent to provide a private federal remedy for the violation of the federal statute." *Id.* at 812 (footnote omitted). Here, there is no doubt that federal law grants landowners like ICS a right to relief; even respondents acknowledge that they could have filed suit in federal court on the basis of these same constitutional allegations. See Resp. Br. 22-24. This accordingly is not a case like *Merrell Dow* in which the defendant removed a complaint on the strength of federal-question jurisdiction even though federal law granted the plaintiffs no rights at all. See also *Moore v. Chesapeake & O.R. Co.*, 291 U.S. 205, 216-17 (1934) (state tort action alleging violation of federal statutory standard not within federal jurisdiction since under the statute "the right of the plaintiff to recover was left to be determined by the law of the State").

It is true that the state-court complaints purport to assert only a state-created right of judicial review rather



than a federal right of action; but the substance rather than the form of a complaint is determinative for jurisdictional purposes. That is certainly true for a complaint filed in federal court. A complaint that fails to identify the proper basis for jurisdiction is not dismissed; such pleading defects are ignored as long as a basis for federal jurisdiction in fact exists. See *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975). See also, *e.g.*, *Albert v. Carovano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988); *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 180 (5th Cir. 1980); *Rohler v. TRW, Inc.*, 576 F.2d 1260, 1264 (7th Cir. 1978). The plaintiff's failure to identify the basis for federal jurisdiction in a state-court complaint should be no more significant, since under the plain terms of the removal statute, "state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Respondents' position that they can control removal merely by electing to cite a state statute rather than Section 1331 as the jurisdictional basis for their complaints is simply an argument that federal jurisdiction can be defeated by artful pleading; yet as we explain in our opening brief (Pet. Br. 20), and as respondents acknowledge (Resp. Br. 25-26), such tactics cannot defeat removal. While respondents claim that they have done nothing that can be taken as "artful pleading," we think they are too modest. Under respondents' theory, as long as a plaintiff can find a state-law procedural vehicle for bringing suit that permits it to raise federal as well as state claims in a complaint, it can defeat the statutory right of removal that Congress has granted to those who must defend claims of right arising under federal law. Yet, it is long settled that a state law—even one purporting to require that claims brought under it must be litigated in state court—cannot abridge the jurisdiction of the federal courts. See Pet. Br. 23 n.14 (discussing *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 253 (1905); *Barrow v. Hunton*, 99 U.S. 80, 85 (1879)).

Even apart from these limitations on a pleader's ability to defeat removal, the *Gully* test also means that even when a plaintiff advances a state-law theory that depends on the existence of a federal right or immunity, the case falls within federal-question jurisdiction. This Court has repeatedly held that federal-question jurisdiction reaches "'those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988) (quoting *Franchise Tax Board*, 463 U.S. at 27-28 (emphasis added)). For example, in both *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and *Hopkins v. Walker*, 244 U.S. 486 (1917), federal-question jurisdiction was sustained over suits in which the plaintiffs asserted state-law rights that turned on federal law—in *Smith*, a shareholder asserted a state-law right to prevent a bank from purchasing federally issued securities on the ground that the federal statute authorizing their issuance was unconstitutional (see 255 U.S. at 201-02), and in *Hopkins* the plaintiffs sued to remove a cloud on their mining claim by alleging that the adverse claimants had no valid claim under applicable federal law (see 244 U.S. at 489, 491).

Here, as we explain in our opening brief, although respondents elected a state procedural vehicle to bring their federal claims, their right to relief on their federal claims depends on nothing but federal law. See Pet. Br. 18-20. Nothing more—in particular, no proof of any violation of a state-created right—is necessary. Yet without so much as discussing *Smith* or *Hopkins*, respondents ask for a radical departure from settled jurisprudence that would enable plaintiffs to defeat removal whenever a state has created a cause of action that also permits them to raise federal claims.

Respondents also claim that their federal claims do not stand alone but instead "are inextricably intertwined with



matters grounded in state law and limited to the administrative record . . . ." Resp. Br. 20. And they correctly observe that the plaintiff may "avoid removal by tailoring his or her complaint to exclude" removable claims. *Id.* at 23. But respondents did not choose this course; their complaints are chock full of allegations of the denial of federal constitutional rights. Had these claims been superfluous, we assume that respondents would not have brought them.[7] And if they truly added nothing, it was entirely within respondents' power, prior to the adverse judgment on the merits by the district court, to avoid federal jurisdiction by voluntarily dismissing those claims. But respondents did the opposite—they filed an amended complaint repeating those claims and expressly invoked federal-question jurisdiction. J.A. 143. It was respondents' own decision to allege numerous federal constitutional violations in addition to their state-law claims. And it is these federal claims that make this a "civil action" within the "original jurisdiction" of the district court.

## III. ABSTENTION PRINCIPLES DO NOT PROVIDE A BASIS TO AFFIRM THE JUDGMENT BELOW.

Respondents devote a substantial portion of their brief not to defending the holding of the court of appeals but to the contention that a remand of this case to state court is proper on grounds of abstention. See Resp. Br. 28-39. Their attempt to inject abstention into the case at this juncture should be rebuffed on both procedural and substantive grounds.

Neither the district court nor the court of appeals considered whether it should abstain from hearing any of

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[7] To the extent that respondents suggest that even their federal claims must be decided on the administrative record under Illinois law, they are mistaken. As we explained in our opening brief, and as the court of appeals acknowledged, in *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 428-30, 551 N.E.2d 640, 646 (1990), the Illinois Supreme Court determined that when an administrative decision is attacked on constitutional grounds the plaintiff may adduce evidence outside of the administrative record. See Pet. Br. 18-19, 38 n.22; Pet. App. 18a-20a.

respondents' claims, and with good reason. Respondents sought a remand to state court on abstention grounds in only the first of the two complaints removed to the district court, and the district court declined to address the merits of abstention at that early stage where it was unclear what legal theories respondents would pursue. See Pet. App. 95a n.1. Respondents never renewed their abstention argument in the district court, and even when seeking remand on appeal they never invoked abstention principles. Thus the record is far from complete on whether respondents' state-law theories require abstention.

As a matter of substance, the state-law issues that respondents seek to litigate do not warrant abstention under either *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Pullman* abstention operates only in "cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1721 (1996). As the Court explained in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), " 'abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' " *Id.* at 237 (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 & n.14 (1967)). And in each of the cases on which respondents rely, state or local law was unsettled. See, *e.g.*, *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 84 (1975) ("the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute"); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 511 (1972) ("terms [of Michigan pollution law] are far from clear"); *Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 640 (1959) (per curiam) ("resolution of [state law problems] is not without substantial difficulty"); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (requiring "preliminary guesses regarding local law"). Here, however, the state law governing this case is too well established, and its contours too far removed from any limiting construction, to avoid determination of the federal constitutional issues urged by respondents.



Respondents identify only three of their claims that, in their view, raise questions of state law warranting abstention: (1) the Landmarks Ordinance violates the Illinois Constitution by delegating legislative power to the Landmarks Commission without "legally sufficient criteria" (Resp. Br. 36); (2) the Landmarks Ordinance effects an unlawful taking under the Illinois Constitution (see *id.* at 36-37); and (3) the Landmarks Ordinance unconstitutionally authorizes a preliminary designation of a property as a landmark without prior notice or opportunity to object (see *id.* at 38 n.18). These state-law issues, however, are ones that can be decided by reference to settled Illinois law—as, indeed, they were by the district court here.

To take the third issue first, while the district court found that this issue posed no special difficulties, J.A. 137-38, the merits are not even properly at issue here. For one thing, ICS filed suit long after the applicable statute of limitations had expired for actions challenging the preliminary designation of the property.[8] For another, respondents did not contest the district court's ruling on this issue in the court of appeals, thereby obviating whatever abstention concerns the court of appeals might have had if it had been called upon to review that ruling.

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[8] The Illinois Local Governmental and Governmental Employees Tort Immunity Act sets a one-year statute of limitations for actions against local governments seeking to recover for an "injury" (745 ILCS para. 10/8-101), and defines "injury" to include constitutional claims (*id.* para. 10/1-204). The preliminary designation of ICS's property as a landmark occurred nearly three years before the suit challenging that designation was filed. And because the permanent landmark designation also was made before respondents filed suit, any claim for injunctive relief—generally outside the Tort Immunity Act—was moot.

The remaining two issues require only the application of clear Illinois law. The unlawful delegation claim is governed by the test announced in *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill. 2d 361, 369 N.E.2d 875 (1977), which requires only "sufficient identification" of "(1) the *persons* and *activities* potentially subject to regulation; (2) the *harm* sought to be prevented; and (3) the general *means* intended to be available to the administrator to prevent the identified harm." *Id.* at 372, 369 N.E.2d at 879 (emphasis in original). As the district court recognized (Pet. App. 46a-54a), under *Stofer* an unlawful delegation attack on a land use ordinance is easily adjudicated using this established test. See, *e.g.*, *People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 361, 372-74, 403 N.E.2d 242, 244, 249-59 (1980) (per curiam) (rejecting unlawful delegation challenge to Redevelopment Act, which allows municipalities to "demolish, remove, renovate, [or] rehabilitate" properties).

As for the takings challenge, respondents are correct that the Illinois Constitution provides broader protection than the federal Takings Clause, since it protects private property from being "taken or damaged" (ILL. CONST. art. I, § 15).[9] The protection against takings, however, is both settled and familiar to federal courts. As the district court recognized (Pet. App. 59a-60a), the test under Illinois law for when governmental action involving no physical invasion of property amounts to a taking is the same as this Court has employed for federal constitutional purposes—whether "governmental regulation radically curtails a property owner's rights such that 'all economically beneficial or productive use of land' is denied." *Forest Preserve District v. West Suburban Bank*, 161 Ill. 2d 448,

[9] Respondents also point to the discussion of Illinois law in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (see Resp. Br. 37), but that involves the test applicable to "exactions"—cases in which a local government requires a property owner to surrender control over part of its property for a public purpose in order to obtain some corresponding benefit. See 512 U.S. at 388-90. ICS alleged no such action in this case.



457, 641 N.E.2d 493, 497 (1994) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). As for damaging property, in *Rigney v. City of Chicago*, 102 Ill. 64 (1881), the court decided that this extra protection applies only when there is "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property . . . ." *Id.* at 80-81. "This definition has stood unchanged and unmodified since *Rigney* was decided." *Citizens Utilities Co. v. Metropolitan Sanitary District*, 25 Ill. App. 3d 252, 256, 322 N.E.2d 857, 861 (1974). And this test for damagings has been specifically applied to zoning restrictions as well. See *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill. App. 3d 115, 121-22, 524 N.E.2d 1119, 1124 (1988).

Thus, to adjudicate respondents' claims the district court needed only to apply well-settled Illinois law to the facts of this case. That task does not require *Pullman* abstention; indeed it is a routine undertaking for federal courts in diversity cases.[10]

*Burford* abstention requires dismissal of an action "only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or

[10] In all events, *Pullman* abstention would not provide a basis to affirm the judgment below remanding the entire case to state court. Under *Pullman* a federal court does not abdicate jurisdiction over the federal claims before it, but instead provides the plaintiff with "a reasonable opportunity to bring appropriate proceedings in the [state] courts, meanwhile retaining its own jurisdiction of the case." *Harrison v. NAACP*, 360 U.S. 167, 179 (1959); accord, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976); *Harris County Commissioners Court*, 420 U.S. at 83-84. Thus *Pullman* abstention does not divest a party of its right to a federal forum if the state court's decision does not obviate the need to decide a federal question. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964). *Pullman* abstention provides "only [a] postponement of decision for its best fruition." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). See also Pet. Br. 46 & n.28.

if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush*, 116 S. Ct. at 1726 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). Neither prong of this test is satisfied here; as we explain above, there are no difficult questions of state law in this case, and for that very reason state policy in this area is clear. *Burford* abstention is rarely if ever appropriate when "state law appears to be settled." *Colorado River*, 424 U.S. at 815. See also *Quackenbush*, 116 S. Ct. at 1728, *id.* at 1729 (Kennedy, J., concurring). In the cases on which respondents rely, intricate state regulatory schemes were at stake in which review was committed to an identified set of state courts so that judges with special expertise could hear such cases. See *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 348 (1951); *Burford*, 319 U.S. at 326-27. Here, in contrast, Illinois law permits any court of general jurisdiction in the county to review an administrative decision (see 735 ILCS para. 5/3-104), and the legal claims at issue are not part of a highly technical regulatory scheme but instead involve long-settled and not particularly complicated principles of state law.

To be sure, the Landmarks Ordinance reflects local concerns, but that fact alone does not warrant abstention, as the Court made quite plain in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959). There, the Court was asked to decide an issue of quintessentially local concern also involving the scope of governmental power over land use planning—the reach of eminent domain powers. The Court explained that "the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty." *Id.* at 191-92. Accord *Meredith v. City of Winter Haven*, 320 U.S. 228, 236-37



(1943). Respondents' contrary view would expand *Burford* abstention to reach the whole of state administrative law since there will always be some significant governmental policy to point to whenever a state or local government has taken the trouble of establishing an administrative enforcement system to address a particular concern. If that were enough to require abstention, nonresident litigants seeking to contest a state administrative decision would never be able to claim the federal jurisdiction Congress provided in the diversity statute, but would instead be remitted to potentially unfriendly state courts in the precise circumstance in which the diversity statute was intended to operate.

It is also far from clear that respondents, as private parties, are the proper parties to make a claim for *Burford* abstention. To justify *Burford* abstention, respondents must rely on the City's interests in controlling land use planning unrestrained by federal interference. See Resp. Br. 30-33. But these interests are the City's, not respondents', and the City's decision to forgo abstention and litigate this matter in federal court should be controlling. As the Court explained in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), when rejecting abstention in favor of a pending state proceeding under *Younger v. Harris*, 401 U.S. 37 (1971), "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." 431 U.S. at 479. Accord *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978).

For all these reasons, the Court could easily reject respondents' abstention arguments. Indeed because respondents did not raise those arguments below, this Court is without the benefit of the views of the lower courts on whether respondents have in fact raised important and unsettled questions better left to the state courts. Of course, had respondents raised abstention below, the court of appeals might not have remanded the case to state court even if it had deemed abstention appropriate. Since respondents

press only questions of law, the court of appeals could have certified questions to the Illinois Supreme Court, as its rules permit. See Ill. Sup. Ct. R. 20. This Court has found certification to be an appropriate alternative to abstention when state law is uncertain and certification is available. See *Lehman Brothers v. Schein*, 416 U.S. 386, 389-91 (1974). Thus the propriety and mode of abstention is best left for the consideration of the court of appeals in the first instance on remand, as is the Court's usual practice with arguments not yet reached by a court of appeals. See, *e.g.*, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 864-65 (1987); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 181-82 (1976). Certainly, at this juncture, abstention provides no basis to affirm the judgment below.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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